

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS J. MCKISSIC,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 219576

Wayne Circuit Court

LC No. 98-009463

Before: Collins, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of unarmed robbery, MCL 750.530; MSA 28.798, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged in connection with a purse snatching at a Dairy Queen restaurant. He was alleged to have driven the car in which the thief fled the scene. Prior to trial, defendant moved to suppress identifications made at a lineup on the ground that the lineup was unduly suggestive because he was the only participant whose physical characteristics approximated those contained in descriptions given by witnesses. The trial court denied the motion, noting that the descriptions given by the witnesses were rather vague and could fit many persons, and that two witnesses identified defendant without hesitation.

At trial, complainant identified defendant's co-defendant as the person who took her purse while she was standing in line at the restaurant. Complainant saw the perpetrator of the theft enter a car and flee the scene; however, complainant could not identify the driver of the car. Complainant's nieces identified defendant as the driver of the car. Defendant's co-defendant testified on defendant's behalf, admitted that he stole complainant's purse on impulse, and asserted that defendant, who was waiting in the car, had no knowledge that he would do so. The trial court found defendant guilty, noting specifically that the co-defendant placed defendant at the scene.

A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). The fairness of a lineup is evaluated under the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). If counsel was present at

the lineup, defendant bears the burden of proving that the lineup was unduly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). We review a trial court's decision to admit identification evidence for clear error. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Defendant argues that he was denied a fair trial by the trial court's admission of identification evidence from a lineup that was unduly suggestive. We disagree and affirm defendant's conviction. The lineup record indicates that six of the seven lineup participants were approximately the same height. Defendant was the heaviest participant; however, the participants were dressed in a manner that somewhat diminished the differences in their weights. The physical characteristics of the other lineup participants approximately matched those of defendant; under such circumstances, differences in physical characteristics go to the weight of the identification evidence and not to its admissibility. *Kurylczyk, supra*, 312; *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). The fact that complainant was unable to identify defendant at the lineup but that the other witnesses identified him without hesitation militates against a finding that the lineup was unduly suggestive. The trial court, as finder of fact, was entitled to accept the identification evidence as credible. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Furthermore, the testimony of defendant's co-defendant, given on defendant's behalf, placed defendant in the car at the scene. Admission of the identification testimony did not prejudice defendant.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Martin M. Doctoroff
/s/ Helene N. White